STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
DWAYNE McGOWAN,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2007CF0048
	)	EEOC NO(S): 21BA62144
and	)	ALS NO(S): 07-566
	)	
HYATT REGENCY HOTEL CHICAGO,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 7th day of January 2011

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
DWAYNE McGOWAN,	)	
	)	
Complainant,	)	
	)	**Charge No.: 2007CF0048**
and	)	**EEOC No.: 21BA62144**
	)	**ALS No.: 07-566**
HYATT REGENCY HOTEL CHICAGO,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response to the motion, and Respondent has filed a written reply to that response. In addition, both parties submitted various documents, including affidavits, in support of their positions. The matter is ready for decision.

The complaint in this matter alleges that Respondent discriminated against Complainant on the bases of his race, African-American, and his national origin, United States of America. Respondent's motion seeks summary decision on both of those claims.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. The Department is therefore named herein as an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. On October 3, 2004, Complainant, Dwayne McGowan, was employed at

Respondent's Hyatt Regency Chicago, as an "on call" server. ("On call" servers are employed on an "as-needed" basis.)

2. Respondent had a Substance Abuse Policy that applied to all employees.

3. A violation of the Substance Abuse Policy disqualified a person from employment with Respondent.

4. As a condition of employment, applicants were required to sign a drug testing consent form as part of the hiring process.

5. Complainant received a copy of the drug testing consent form.

6. Respondent had in place an equal employment opportunity policy which included a statement against both race and national origin discrimination. It also had a procedure to enforce its policy.

7. In April 2006, Respondent posted nine full-time banquet server positions.

8. On or around April 24, 2006, Complainant applied for one of the full-time banquet server positions.

9. A panel of management and union representatives reviewed the applications and selected a group to interview, including Complainant.

10. On June 12, 2006, Complainant was selected for one of the nine server positions.

11. Of the nine applicants who were considered for the server positions, eight of them had to submit to Respondent's drug testing.

12. The one applicant who was not required to take a drug test was a full time employee who previously took and passed it. His application for the server position was a transfer to a different department.

13. On June 19, 2006, Complainant signed Respondent's drug testing consent form.

14. Respondent administered a saliva swab drug test to the eight applicants, including Complainant.

15. Complainant's drug saliva swab test results were found to be "inconclusive."

16. The other seven applicants' drug tests were "negative" for illegal drugs.

17. Pursuant to Respondent's Drug-Testing Policy, if drug test were found to be "inconclusive," the applicant had to submit to a 5 panel urine test and test "negative" in order to be eligible for further employment consideration.

18. On July 3, 2006, Complainant's 5 panel urine tested "positive" for marijuana.

19. Respondent reviewed the chain of custody of Complainant's specimen to the lab results, and found it credible and substantiated.

20. Respondent informed Complainant of his urine test by letter, but used the term "inconclusive" instead of "positive" as per its practice.

21. The same letter that informed Complainant of his drug test results, also instructed him on how to contest it. Complainant had 72 hours from receipt of the letter to contact the third party drug center's medical review officer to explain his test results or to contact Respondent's Human Resources Department to alert them that he was interested in having the test results independently verified by another lab.

22. Complainant failed to choose either option, as mandated by Respondent, for contesting the second of his adverse drug test results.

23. Consequently, Complainant was not offered the full-time banquets server position and was also removed from Respondent's "on call" server list.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a *prima facie* case of discrimination against him on the basis of his race.

4. Complainant cannot establish a *prima facie* case of discriminatory against him on the basis of his national origin.

4. Respondent can articulate a legitimate, non-discrimination reason for its actions.

5. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

6. A summary decision in Respondent's favor is appropriate in this case.

DISCRIMINATION

Summary Decision Standard

Under Section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist.1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist.1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist.1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a

party's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

Complainant as a *Pro Se* Litigant

Pro Se Complainant, Dwayne McGowan, guided his case through the Department and the Commission, authoring pleadings and submitting written responses. There is some sympathy with the *pro se* litigant, as the practice of law requires skills that sometimes test the abilities of licensed attorneys. However, "Justice requires that the parties live with litigation decisions they have made, either through their attorney or on a *pro se* basis." Fitzgerald and Fischer Imaging Corp., IHRC, ALS No.10142, May 29,1998.

The fact that Complainant is a *pro se* litigant has no influence on this decision, as "...a *pro se* litigant is held to the standard of an attorney." Mininni and Inter-Track Partners, IHRC, ALS No.7961, December 10,1996 quoting First Illinois Bank and Trust v. Galuska, 155 Ill.App.3d 86, 627 N.E.2d 325 (1st Dist.1993). The Illinois Appellate Court advises, "Our task is not to divine the truth from the interstices of the parties' filings or to sift through the record like a tealeaf reader conjuring up fortunes in order to gain a proper understanding of the case before us." Id. Complainant's written Response is held to the mandatory standards cited above.

Racial Discrimination Standard

To establish a *prima facie* case of racial discrimination, Complainant must prove: 1) he is in a protected class; 2) he was meeting Respondent's legitimate performance expectations; 3) Respondent took an adverse action against him; and 4) similarly situated employees outside Complainant's protected class were treated more favorably. Interstate Material Corp. v. Human Rights Comm'n, 274 Ill.App.3d 1014, 1022, 654 N.E.2d 713, 718 (1st Dist.1995).

National Origin Discrimination Standard

A Complainant can prove a *prima facie* claim of national origin discrimination under the Act by showing that: 1) he is a member of a class protected by the Act; 2) that he was performing satisfactorily in his job; 3) he suffered an adverse employment action; and 4) similarly situated workers outside the protected class did not suffer the same adverse action. Freeman United Coal Mining Company v. Illinois Human Rights Commission, 173 Ill.App.3d 965, 527 N.E.2d 1289 (5th Dist.1988).

Where, however, the legitimate, non-discriminatory reason for the employment action has been made clear, it is no longer necessary to determine whether a *prima facie* case has been made. Since the only purpose of this type of *prima facie* case is to determine whether the Respondent has to articulate a legitimate reason for its action, it becomes perfunctory to analyze the matter in terms of a *prima facie* case if the legitimate, non-discriminatory reason for the action has already been articulated. *Bush and The Wackenhut Corporation,* 33 Ill. HRC Rep. 161,165,(1987) quoting, U.S. Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478 (1983).

By definition, proof of a *prima facie* case raises an inference that there was discrimination. By articulating a reason for the employment action in issue, the Respondent destroys the inference. At that point, the question becomes whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Id.

There are two methods by which Complainants may prove pretext: directly, by establishing that a discriminatory reason more likely motivated Respondent, or indirectly, by showing that Respondent's proffered reason is unworthy of credence. Roger and Commonwealth Edison Company, IHRC, ALS No. 7512R, March 17, 1998.

In St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), the Supreme Court ruled that even when a plaintiff proves an employer's reason for the challenged action to be false, he or she will not automatically prevail.

The question is not whether the employer in this case made a "perfect decision," but rather whether the decision was one based on race discrimination. Bush, supra, at 169. A business decision may be considered "legitimate" and "non-discriminatory" within the meaning of McDonnell Douglas, supra, "even though the decision is not the most equitable one which could be made." *Phillips, et al and Walsh Construction Company of Illinois,* 41 Ill. HRC Rep. 207, 216 (1988). The Complainant must present some evidence that the employer's explanation has been found to be "unworthy of credence." Id. The accuracy of the employer's decision is secondary as long as there is a good faith belief in it. Holmes v. Board of County Commissioners, Morgan County. 26 Ill. HRC Rep. 63 (1986).

The facts in this case are not particularly complicated. Complainant was an "on call" server with Respondent, which means that he was employed on an "as needed" basis, when he had an opportunity to apply for a full-time banquet server position. A panel of both management and union representatives reviewed the applications and made their selections, which included Complainant. On June 12, 2006, Complainant was one of eight persons given a conditional offer of employment contingent on his passing its drug test. One individual who was selected to be a server was an employee of Respondent, so his appointment was a transfer from one department to another and not an entrance position. At the time of his selection, the employee had already successfully complied with the drug testing policy of Respondent.

In conformity with the conditional offer of employment, on June 19, 2006, Complainant signed Respondent's drug testing consent form. Respondent then administered a saliva swab drug test to all the applicants including Complainant. However, Complainant's results were "inconclusive." The other seven applicants' drug test results were "negative" for illegal drugs. Neither the Complainant nor the Respondent identified the race or national origin of the applicants, testers or lab employees. Complainant does not contend that Respondent's policy on drug testing was discriminatory.

Pursuant to Respondent's Drug-Testing Policy, if an applicant's drug test was "inconclusive," the applicant had to submit to a 5 panel urine test and the results must be found to be "negative" in order to be eligible for further employment consideration. On July 3, 2006, Complainant's urine test was found to be "positive" for marijuana.

Still, Complainant had recourse. Complainant had 72 hours from receipt of the letter informing him of the drug test results to contact the third party drug center's medical review officer to explain his test results or to contact Respondent's Human Resources Department to alert them that he was interested in having the test results independently verified by another lab. Complainant failed to choose either option. As a result, Complainant was not offered the full-time banquet server position and was also removed from Respondent's "on call" server list. It appears that if Complainant just passed the drug test or successfully overturned the last of the two adverse results, he would have been hired.

Complainant had an opportunity to contest the second drug test results, but instead he choose to leave criticisms on Respondent's voice mail and with its employees, challenging the source of the last drug test and alleging of technical blunders. The closest to an allegation of discrimination was the broad statement that some "non-black applicants" did not have to take a drug test. However, except for this broad unsubstantiated allegation, Complainant failed to present evidence of race or national origin discrimination. Even if Respondent's drug test was flawed, Complainant had to present some facts of illegal discrimination. Accordingly, Complainant failed to present some factual basis that would create a triable issue on the question of whether Respondent's articulated reason for its decision to terminate Complainant was a pretext for race and/or national origin discrimination.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 22, 2010